

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Kepeco, Inc.	:	
for Redetermination of a Deficiency or Revision	:	AFFIDAVIT OF MAILING
of a Determination or Refund of Corporation	:	
Franchise Tax under Article 9A of the Tax Law for	:	
the Period 5/31/79-5/31/80.	:	

State of New York :
County of Albany : ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of December, 1984, he served the within notice of Decision by certified mail upon Kepeco, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kepeco, Inc.
131-38 Sandford Ave.
Flushing, NY 11352

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
31st day of December, 1984.

David Parchuck

Nicola J. Williams
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Kepco, Inc.

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Period 5/31/79-5/31/80. :

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 31st day of December, 1984, he served the within notice of Decision by certified mail upon Nathan T. Schnitzer, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nathan T. Schnitzer
Fox and Company
1211 Avenue of the Americas
New York, NY 10036

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
31st day of December, 1984.

David Parchuck

Nicola J. Williams
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

December 31, 1984

Kepeco, Inc.
131-38 Sandford Ave.
Flushing, NY 11352

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Nathan T. Schnitzer
Fox and Company
1211 Avenue of the Americas
New York, NY 10036
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
KEPCO, INC.	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Fiscal Years	:	
Ending May 31, 1979 and May 31, 1980.	:	

Petitioner, Kepco, Inc., 131-38 Sandford Avenue, Flushing, New York 11352, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ending May 31, 1979 and May 31, 1980 (File No. 43600).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 13, 1984 at 11:00 A.M., with all briefs to be submitted by June 15, 1984. Petitioner appeared by Fox & Company, C.P.A.'s (Nathan T. Schwitzer, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether the Audit Division properly required the petitioner to add back interest expense deducted in the computation of entire net income as interest paid indirectly to members of the immediate families of petitioner's stockholders.

FINDINGS OF FACT

1. On December 29, 1982, the Audit Division issued two notices of deficiency against petitioner, Kepco, Inc., asserting corporation franchise tax due of \$41,817.00 plus interest and \$2,260.00 plus interest for the fiscal years

ending May 31, 1979 and May 31, 1980, respectively. According to the statements of audit adjustment which were attached to the deficiency notices, the alleged corporation tax deficiencies were based on a "recent field audit."

2. For the period ending May 31, 1979, petitioner filed a combined corporation franchise tax report with its wholly-owned subsidiary, Forbro Design Corp., and reported entire net income of \$444,935.00 for the parent corporation (i.e. petitioner) and entire net income of \$157,310.00 for the subsidiary. For the period ending May 31, 1980, petitioner did not file a combined corporation franchise tax report and reported entire net income of \$1,230,003.00. (There is no evidence in the record that explains the change in filing status.) The alleged deficiencies noted in Finding of Fact "1", supra, resulted from the Audit Division's adding to the entire net income reported by petitioner for each of the fiscal years at issue an amount equal to ninety percent of the interest expense deducted by petitioner on loans owed to trusts which benefited the children of petitioner's stockholders.

3. Petitioner manufactures power supplies (electronic equipment used to increase voltage output). It has a national market and sells to college laboratories and major corporations.

4. Four brothers each own twenty-five percent of petitioner's shares of stock: Jack Kupferberg, petitioner's president; Jesse Kupferberg, petitioner's vice-president; Kenneth Kupferberg, petitioner's secretary; and Max Kupferberg, treasurer.

5. In 1960, each brother created a trust for the benefit of their respective children. (Two of the Kupferberg brothers have two children, a third, three children, and the fourth, four children.) They each contributed money and property to their respective trusts. Petitioner did not introduce the

trust agreements into evidence, according to its representative "for the privacy of my clients." As a result, the information concerning the trusts is based upon the testimony of petitioner's accountant, Abraham Levine. He testified as follows:

(i) The trustees of the trusts during the years at issue were Theresa Silverman, a sister of the Kupferberg brothers and Mildred Diamond, petitioner's bookkeeper;

(ii) The beneficiaries of the trust, the children of the Kupferberg brothers, were not entitled to the income from the trusts and received income only if the trustees, in their discretion, gave it to them;

(iii) The trustees consulted with the brothers to obtain their advice concerning the investment of trust assets;

(iv) The trusts constructed a factory and office building which they leased to petitioner;

(v) In 1970, the trusts had an "excess of funds", which was loaned to petitioner at an interest rate less than the rate at which petitioner would have been charged by a bank, for petitioner's "working capital" needs. Such loans were finally paid off by petitioner in 1981 because petitioner, by then, had accumulated sufficient cash for its working capital needs.

CONCLUSIONS OF LAW

A. That Tax Law §208.9(b)(5) provides, in part, that entire net income shall be determined without the deduction of "ninety per centum of interest on indebtedness directly or indirectly (emphasis added) owed to any stockholder or shareholder...or member of the immediate family of an individual stockholder or shareholder, owning in the aggregate in excess of five per centum of the issued capital stock of the taxpayer..."

B. That the interest paid on loans made by the trusts, described in Finding of Fact "5", supra, to petitioner was indirectly (via the trusts) paid to members of the immediate families of petitioner's four stockholders, who each owned twenty-five percent of petitioner's stock. In addition, as noted in Finding of Fact "5", supra, petitioner's four stockholders retained significant


power and influence over the way in which the assets of the trusts would be invested. Consequently, the loans made by the trusts may reasonably be viewed, in the alternative, as indebtedness indirectly owed to the petitioner's stockholders, themselves.

C. That the petition of Kepco, Inc. is denied.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER